

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7162

UNITED STATES COURT OF APPEALS
for the Second Circuit

JOHN F. COSTELLOE,

Plaintiff-Appellant,

against

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

On Appeal from an Order of the United States District Court
for the Eastern District of New York

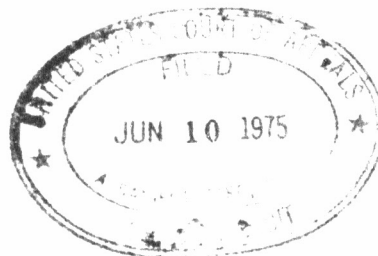
BRIEF FOR DEFENDANT-APPELLEE

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INDEX

	<u>Page</u>
Preliminary Statement.....	1
The Issue Presented for Review.....	2
STATEMENT OF THE CASE--	
The Complaint.....	2
The Proceedings Below.....	5
ARGUMENT--	
I. THE ORDER OF THE DISTRICT COURT DISQUALIFYING COSTELLOE FROM MAINTAINING THIS ACTION SHOULD BE AFFIRMED.....	7
CONCLUSION.....	15

AUTHORITIES CITED:

<u>Doe v. A. Corp.</u> , 330 F.Supp. 1352 (S.D.N.Y. 1971), aff'd sub nom, <u>Hall v. A. Corp.</u> , 453 F.2d 1375 (2d Cir. 1972).....	12
<u>Emle Industries, Inc. v. Patentex, Inc.</u> , 478 F.2d 562 (2nd Cir. 1973).....	12, 13
<u>Hull v. Celanese Corporation</u> , No. 74-2126 (2d Cir., March 26, 1975) (Slip Op. 2539).....	9, 10
<u>In Re Metrik</u> , 19 A.D.2d 34, 240 N.Y.S.2d 443 (1st Dep't 1963).....	7
<u>Meyerhofer v. Empire Fire and Marine Insurance Co.</u> , 497 F.2d 1190 (2d Cir. 1974), cert. denied, 95 S.Ct. 314 (1974).....	12, 13
<u>Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation</u> , No. 74-1104 (2d Cir. May 23, 1975) (Slip Op. 3669).....	10, 11

OTHER AUTHORITIES

	<u>Page</u>
Code of Professional Responsibility, Canons 4 and 9.....	11

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BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal from an order entered in the United States District Court for the Eastern District of New York by the Honorable Orrin G. Judd dismissing the complaint and holding that plaintiff-appellant, John F.

Costelloe ("Costelloe"), was disqualified from maintaining this action against defendant-appellee, Trans World Airlines, Inc. ("TWA"). The decision is unreported and is set forth at A44-48.*

The Issue Presented for Review

Whether the district court abused its discretion in disqualifying an attorney from maintaining a pro se action against a client of the law firm in which the attorney was once a partner and had represented the client in tax matters, including matters claimed to be one of the bases for the present action.

STATEMENT OF THE CASE

The Complaint

The complaint is set forth at A1-15 and A19-34.

As summarized by Judge Judd, the complaint alleges:

". . . various types of misconduct. . . on the part of Trans World Airlines (T.W.A.), including improprieties of the sale of 747

*References marked A are to the pages of the Joint Appendix. Unless otherwise indicated, emphasis is supplied.

airliners to Iran, antitrust violations, misrepresentation of its financial condition, including failure to show tax liabilities which may be inconsistent with its financial solvency and violative of its covenants with debt service, airline kickbacks to travel agents and improper payment to the campaign fund of Congressman Mills, among other things." (A44)

More particularly, the complaint charges that TWA's "tax liabilities are grossly understated" (Complaint, ¶22, A8); that "litigation following deficiency assessments in pipeline matters* as to which there is doubt of integrity of accounting, and occasioning action by TWA in the United States Tax Court in July, may in itself produce very large deficiencies in tax, to be increased by addition of fraud penalties if only in respect of the kickback matter" (Complaint, ¶30, All); that "these tax aspects are matters of fact requiring disclosure" (Complaint, ¶31, All), and that time does not "allow development of critical facts of relations with the Internal Revenue Service, illustrated by the copy of letter to the Internal Revenue Service included in sealed envelope made Exhibit A. Seal is used to preserve confidence of a matter which the IRS may not want disclosed further at this juncture except to the Court in camera." (Complaint, ¶41,

*The term "pipeline matters," as used by Costelloe, embraces aircraft spare parts when stored by TWA at the repair stations throughout its system.

A14).

Exhibit A to the complaint is set forth at A19-34. It consists of a letter from Costelloe to counsel for the Internal Revenue Service dated January 27, 1975 in which Costelloe questions the "integrity of TWA pipeline asset accounting" (A19).

Costelloe's letter continues:

"I was the senior tax partner of Chadbourne, Parke, Whiteside & Wolff until June of 1968, and I personally attended to the more important aspects of TWA tax matters as partner before that time and as consultant and otherwise for some time afterwards. I tried for years to get pipeline data, with help of several successive TWA Tax Directors. None of us could get data available normally. None believed that data made available to us established existence of the assets. In some other respects, including some liability accruals, TWA had on occasion reached specific dollar amounts on only the broadest of assumptions.

"The pipeline asset accounting function was lodged in the maintenance function, out of the mainstream. I continued as a consultant on TWA matters after leaving the firm in protest of Dunn's acting both as Chadbourne Senior Partner and employee of a client, Sperry, in purported membership in its 'qualified' retirement plan. After leaving Chadbourne, I continued to negotiate for TWA, with almost complete success, settlement of other proposed income adjustments running to about \$150,000,000, including pension matters (A). I could not, however, get data on pipeline assets. I recommended partial settlement, with the pipeline and maintenance matters left open (B). Efforts continued in anticipated refusal to accept the TWA positions. A memorandum of mine of February 24, 1970, (C) epitomized continued frustration:

"I told Joe that I felt that a good deal of work would be in order on the matters yet unagreed - overhauls and pipeline. In all the years I have watched these issues I have never heard of a thoroughgoing development of the facts of the sort which I think Appellate Division should have to support a favorable determination - if not to try to right a prospective unfavorable determination." (A19-20).

* * *

"In a meeting with personnel of the U. S. Attorney's Office and the CAB on the day President Nixon announced his resignation, I expressed concern that the other side of large kickback amounts might be in false pipeline accounting." (A22).

Costelloe's letter concludes:

"I am sending a copy of this letter to Mr. Trager, U. S. Attorney for the Eastern District, where the kickback grand juries have been functioning; and to Mr. Albert of Intelligence. I may have occasion also to send copies to the SEC, and to the Secretary Designate of Commerce, and to the Attorney General, Designate, as well as to Committees of Congress. Otherwise lives may be lost and National interests gravely injured without need. If you have any objection or suggestion, please let me know at once." (A33-34).

The Proceedings Below

By order to show cause Costelloe sought a preliminary injunction requiring that TWA (a) "comply with requirements of Rule 10b-5 of the Securities Exchange Commission in respect of its tax liabilities," and (b) "refrain

from action towards or for or effectively looking to consummation of sale or other disposition of aircraft or contract therefore (sic), from TWA to the Government or State or Nation of Iran . . ." (A36-37).

A hearing was held by Judge Judd in chambers on February 7, 1975.*

At this hearing Costelloe admitted that he had worked as a lawyer on TWA tax matters (SA10).**

Costelloe further testified as follows:

"That brings in two matters, something I did work on. I worked on the pipeline matter and gave up, said I could not get proof the matter existed. I said that in 1970. I quit the T.W.A. work then on that account." (SA12)

At the conclusion of the hearing Judge Judd ruled that Costelloe was disqualified from maintaining this action, stating:

"It appears without contradiction that plaintiff was a partner of the law firm of Chadbourne, Parke, Whiteside & Wolff from March 1958 to June 1, 1968; that he was a tax consultant for that firm thereafter until December 31, 1971; that the firm has been counsel for many years for Trans World Airlines, Inc., and that plaintiff worked on tax problems for T.W.A. at least until some time in the year 1970." (A45)

*The transcript of this hearing is set forth in a Supplemental Appendix filed herewith.

**References marked SA are to the pages of the Supplemental Appendix comprising the transcript of the hearing before Judge Judd on February 7, 1975.

* * * * *

"Some of the matters involved in the complaint and the application for an injunction have arisen subsequent to Mr. Costelloe's termination of any activity with respect to T.W.A. matters, but the complaint, as a whole, involves the possibility of delving so far into T.W.A. corporate matters and intercorporate and governmental relationships that it would be unseemly to permit him to act either as a party or as an attorney in the action." (A46)

Judge Judd made no determination at the hearing on the suggestion that Costelloe should be censured for unprofessional conduct (SA24, SA27, SA47-48).^{*} On March 13, 1975 Judge Judd advised counsel that "any initiative for disciplinary proceedings should be taken . . . through an appropriate bar association" (A159A).

ARGUMENT

I

THE ORDER OF THE DISTRICT COURT DISQUALIFYING
COSTELLOE FROM MAINTAINING THIS ACTION SHOULD
BE AFFIRMED

From March 1958 until June 1, 1968 Costelloe was a member of the law firm of Chadbourne, Parke, Whiteside & Wolff (the "firm"), TWA's counsel. From June 1, 1968 until December 31, 1971 Costelloe was employed as a consultant to the firm (A50).

On January 12, 1973 Costelloe attempted to bill TWA "for professional services rendered, quantum meruit

^{*}Cf. In Re Metrik, 19 A.D.2d 34, 240 N.Y.S.2d 443 (1st Dep't 1963).

including disbursements," in the amount of \$750,000 (A54-55). Costelloe's only services on TWA's matters had been rendered either as a partner or a consultant of the firm. TWA had retained the firm, not Costelloe, and there was thus no basis for Costelloe's billing. TWA refused to pay Costelloe's bill (A50).

Costelloe thereupon instituted a letter writing campaign against the firm and TWA. How many such letters were written, only Costelloe knows. Many of these letters were addressed to third persons, including Government officials and heads of regulatory agencies (A50-51).

Exhibits of this letter writing campaign are attached as Exhibits B-D, inclusive, to the affidavit of Raymond R. Fletcher, Jr., Vice President and General Counsel of TWA (A51-52, A56, A58, A63).

For example, on December 25, 1974 Costelloe addressed a letter to 5 partners of the firm, 17 representatives of 5 of the firm's clients and the Chairman of Citicorp (A77). Enclosed with that letter was a draft communication which Costelloe proposed to send to David G. Trager, United States Attorney for the Eastern District of New York (A79-83).

With respect to TWA's tax matters, on which Costelloe had worked while associated with the firm, and which comprise a substantial portion of the complaint (Complaint, ¶¶22, 29, 30, 31, 41 and Ex. A; A8, A10-11, A14,

A19-34), Costelloe's proposed letter to Mr. Trager stated:

"I had settled almost all of \$150,000,000 of income adjustments asserted against TWA with great success. I could not settle a 'pipeline' matter. The pipeline is the repository of spares such as reworked landing gear and lifting surfaces supposedly kept around the world for use as needed. I could not get proof of existence of those assets. Nor could Chadbourne, which began Tax Court litigation in July with potential of about \$20,000,000 for or against TWA.

"Pipeline assets are about as fungible moveable and proveable as salad oil. If the assets in pipeline are pipedream lives may be lost in the time it takes to prove that."
(A81-82)

At the hearing before Judge Judd on February 7, 1975, Costelloe again charged that TWA's aircraft spare parts did not exist, saying:

"Your wings don't even exist. Pipeline assets are fake."* (SA24)

At the conclusion of the hearing, Judge Judd held that it would be unseemly to permit Costelloe "to act either as a party or as an attorney in the action" (A46). Manifestly, Judge Judd's ruling is correct.

As stated by this Court in Hull v. Celanese Corporation, No. 74-2126 (2d Cir., March 26, 1975) (Slip Op. 2539 at 2544):

*There is, of course, no basis for Costelloe's charge.

"The district court bears the responsibility for the supervision of the members of its bar. Handelman v. Weiss, 368 F.Supp. 258, 263 (S.D.N.Y. 1973); E. F. Hutton & Company v. Brown, 305 F.Supp. 371, 378 (S.D. Tex. 1969). The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. Richardson v. Hamilton International Corporation, 469 F.2d 1382, 1385-86 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973). Moreover, in the disqualification situation, any doubt is to be resolved in favor of disqualification. Fleischer v. A.A.P., Inc., 163 F.Supp. 548, 553 (S.D.N.Y. 1958), appeal dismissed, 264 F.2d 515 (2d Cir.), cert. denied, 359 U.S. 1002 (1959)."

The cases involving disqualification of an attorney have recently been reviewed in depth by this Court in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, No. 74-1104 (2d Cir. May 23, 1975) (Slip Op. 3669). There Judge Moore, in a careful and thorough opinion, affirmed an order of Judge Weinstein denying a motion to disqualify plaintiff's counsel, Dale Schreiber, who, while an associate in the office of Chrysler's counsel, had worked on certain Chrysler matters. Judge Weinstein had concluded that the Chrysler matters upon which Schreiber had worked were not substantially related to the litigation in the Silver Chrysler Plymouth case.

In affirming Judge Weinstein's order, Judge Moore said:

*Manifestly Judge Judd did not abuse his discretion in disqualifying Costelloe here.

"Judge Weinstein also concluded that Schreiber had rebutted any inference, arising merely from his former association with Kelley Drye, that he possessed confidences that can be used against Chrysler in this lawsuit. We think the district judge was plainly correct. There may have been matters within the firm which, had Schreiber worked on them, would have compelled disqualification here. But Schreiber denied having been entrusted with any such confidences. He was supported in this respect by the affidavits of Gurney and Baum. This was sufficient." (Slip Op. at 3680-81)

This case is at the other end of the spectrum. Costelloe was not a two-year associate performing tasks assigned to him by supervising associates. Costelloe was a partner in the law firm representing TWA and by his own admission had "personally attended to the more important aspects of TWA tax matters as partner before [June 1968] and as consultant and otherwise for some time afterwards" (A19). He had "for years" worked on TWA's "pipeline" matters and on other tax matters with respect to "proposed income adjustments running to about \$150,000,000" (A20). It is a case in which Costelloe has attempted to collect from TWA money not due him by threatening to divulge the confidences reposed in him by TWA.

It is difficult to conceive of a more direct violation of Canons 4 and 9 of the Code of Professional Responsibility. These require Costelloe to preserve the confidences and secrets of TWA and to avoid even the appearance of professional impropriety. Costelloe would do neither. Instead, he would attempt to embarrass and harass TWA at every turn.

Costelloe may neither be a party to or act as attorney for a party in this litigation which embraces tax matters involving TWA. Meyerhofer v. Empire Fire and Marine Insurance Co., 497 F.2d 1190, 1196 (2d Cir. 1974), cert. denied, 95 S.Ct. 314 (1974); Doe v. A. Corp., 330 F.Supp. 1352 (S.D.N.Y. 1971), aff'd sub nom, Hall v. A. Corp., 453 F.2d 1375 (2d Cir. 1972).

Costelloe should be "prohibit[ed] from acting as a party or as an attorney for a party in any action arising out of the facts herein alleged . . ." Meyerhofer v. Empire Fire and Marine Insurance Co., supra, p. 1196.

As stated by Judge Kaufman in Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973):

"The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage."

This Court need not inquire whether Costelloe did, in fact, receive confidential information during his

previous employment which might be used to TWA's disadvantage here. As pointed out by Judge Kaufman in Emle Industries, Inc. v. Patentex, Inc., supra, p. 571:

" . . . Canon 9 of the Code of Professional Responsibility cautions that 'A lawyer should avoid even the appearance of professional impropriety' and it has been said that a 'lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a possible violation of confidence, even though this may not be true in fact.' American Bar Association, Standing Committee on Professional Ethics, Informal Opinion No. 885 (Nov. 2, 1965)."

Costelloe's disregard of professional responsibility in this case goes far beyond the bounds set in Meyerhofer and Emle Industries, supra. There disqualification was ordered when there was merely "an appearance of a possible violation of confidence." Meyerhofer, supra at p. 1196. Here Costelloe has threatened TWA if he is not paid "quantum meruit" for legal services when in fact no sum whatsoever was owing by TWA (A50-51). Costelloe has threatened and libeled the Chairman of the Board of TWA (A60-61). Costelloe has made repeated telephone calls to TWA's Vice President and General Counsel, threatening TWA with dire consequences if Costelloe is not paid immediately (A52). And Costelloe has sought to challenge the integrity of TWA's accounting before the Internal Revenue Service (A19-20).

Much, if not most, of what is contained in Costelloe's brief is not only without any basis in the record but is completely irrelevant to the issue before the Court. In addition, many of Costelloe's statements are either completely untrue or a gross misrepresentation of the facts.* Since such statements have no conceivable bearing on the matter at issue, we do not propose to burden the Court with a detailed rebuttal of them. However, we do wish to point out that by not doing so we are not acquiescing in the accuracy of such statements. Specifically, but by no means exclusively, failure to comment should not be construed as our agreement with the statements by Costelloe as to purported admissions and concessions by the firm or one of its partners or other statements attributed to them.

*For example, Costelloe in his brief suggests that he left the firm because one of its senior partners "had styled himself also a full time employee of a major client" (Costelloe brief, pp. 27-28). In his complaint in the case of John F. Costelloe, plaintiff, pro se v. Daimler Benz of North America (74 Civ. 2357 (CHT)), Costelloe alleges that the reason he left the firm was because Daimler Benz persuaded him to give up his partnership in the firm by reason of "promises of a [Daimler Benz] distributorship and dealership for western Massachusetts and its sales and other action in consequence" (Complaint, 74 Civ. 2357, ¶124). Whatever truth there may be in the "Daimler Benz" version, there is no basis for the version in Costelloe's brief in this case.

CONCLUSION

The order of the district court disqualifying
Costelloe from maintaining this action should be affirmed.

Respectfully submitted,

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Harold L. Warner, Jr.
Donald I Strauber

Of Counsel

Dated: New York, New York
June 10, 1975

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOHN F. COSTELLOE,	:	
Plaintiff-Appellant,	:	<u>CERTIFICATE OF SERVICE</u>
-against-	:	Index No. 75-7162
TRANS WORLD AIRLINES, INC.,	:	
Defendant-Appellee.	:	

-----x

STATE OF NEW YORK)	
	:	ss.:
COUNTY OF NEW YORK)	

Harold L. Warner, Jr., being duly sworn, deposes
and says:

1. I am attorney for defendant-appellee in this case.
2. Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that I have served on John F. Costelloe, plaintiff-appellant, pro se, two copies of Brief for Defendant-Appellee and one copy of Appellee's Supplemental Appendix in conformance with Rule 31(b) of the Federal Rules of Appellate Procedure by mailing the same on this 10th day of June, 1975 addressed as follows:

John F. Costelloe, Esq.
216 Little Neck Road
Centerport, New York 11721

Harold L. Warner, Jr.

Harold L. Warner, Jr.
Attorney for Defendant-Appellee
30 Rockefeller Plaza
New York, New York 10020

Subscribed and sworn
to before me this 10th
day of June, 1975.

Barbara J. Scannapieco
Notary Public

BARBARA J. SCANNAPIECO
Notary Public, State of New York
No. 43-2003050
Qualified in Richmond County
Cert. Filed in New York County
Commission Expires March 30, 1977